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Introduction

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INTRODUCTION

SHELDON NAHMOD*

When the Supreme Court declared almost off-handedly in *Monroe v. Pape* that § 1983 was to be interpreted against the “background of tort liability,”¹ the Court raised far more questions than it has ever definitively answered. Are tort rules merely helpful or are they sometimes (or always) determinative? Are they relevant to § 1983 statutory interpretation issues only, or do (and should) they also guide answers to questions of constitutional interpretation? Which tort rules are to be used: a “distilled essence” of the common law of the states or a kind of federal common law? What of the period from which the tort rules are to be extracted: Must courts be guided only by the tort law extant in 1871, when § 1983 was enacted by the Forty-second Congress? Or should the tort rules used in § 1983 interpretation instead reflect the significant changes in tort law in the twentieth century? Remarkably enough, at different times the Supreme Court has answered every one of these questions in the affirmative, which brings us to the subject of this Symposium.

This Section 1983 Symposium had its genesis two years ago when several past and present chairs of the Association of American Law Schools (“AALS”) sections on Civil Rights and Federal Courts agreed to hold a joint program at the annual January meeting of the AALS. The important topic chosen by then-chairs Professor George Brown of Boston College (Federal Courts) and Professor Karen Blum of Suffolk University (Civil Rights) was the relationship between § 1983 and tort law. As a past chair of the Civil Rights section, I suggested at the time that the *Chicago-Kent Law Review* would publish any papers resulting from the joint program, together with others of interest, in a special Section 1983 symposium issue. The suggestion was enthusiastically accepted by the chairs and the invited speakers, and the result is this Symposium.

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1. 365 U.S. 167, 185 (1961), *overruled in part by* *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978) (overruling *Monroe's* holding that cities were not persons subject to § 1983 liability).

The three speakers at the AALS program contributed articles based on their presentations. They are Professor Michael Wells of the University of Georgia, Professor Christina Whitman of the University of Michigan, and Professor Laura Oren of the University of Houston. Professor Jack Beermann of Boston University and I also wrote articles especially for this Symposium. All of us have written extensively and thought deeply about § 1983 and the relationship between it and tort law in particular.

Professor Wells, in his article *Constitutional Torts, Common Law Torts, and Due Process of Law*, proposes what he calls a "better analytical model" for constitutional torts—a unitary due process approach—as against what he terms the Supreme Court's multifaceted approach. In his view, the result of the Supreme Court's approach has been a "doctrine that rests on flimsy foundations, and a body of rules that do not serve . . . constitutional values"² In response, Professor Whitman in her article, *Emphasizing the Constitutional in Constitutional Torts*, maintains that tort doctrines and categories do not provide an appropriate model for constitutional decision-making. Her position is that when it comes to constitutional claims, "torts is a distraction."³ Professor Beermann, in his *Common Law Elements of the Section 1983 Action*, looks generally at the role of the common law of torts in § 1983 interpretation. He then goes on to argue that, because of its common law tort grounding, the Supreme Court's recent habeas corpus/§ 1983 decision in *Heck v. Humphrey* has the potential to undermine § 1983.

Professor Oren's article, *Section 1983 and Sex Abuse in Schools: Making a Federal Case Out of It*, contends that tort concepts can and should be used creatively in cases involving supervisory liability for sex abuse in school. She approaches this supervisory liability issue as an opportunity to engage § 1983 personal fault doctrine in a "dialogue" with common law tort concepts. Finally, my article, *The Restructuring of Narrative and Empathy in Section 1983 Cases*, is not, strictly speaking, about the relationship between § 1983 and tort concepts. Nevertheless, in suggesting that the Supreme Court's qualified immunity decisions have so structured the § 1983 litigation process that judges are encouraged to empathize with individual defendants, I intend to contrast that now-changed litigation process with the ordi-

2. Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHI.-KENT L. REV. 617, 660 (1997).

3. Christina Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 661 (1997).

nary tort litigation process in which both sides have an equal opportunity to narrate their stories.

As faculty editor of this Symposium, I wish to thank all of the authors for their participation, as well as Professors Brown and Blum and the AALS sections of Federal Courts and Civil Rights, for their willingness to hold a joint program on this very important topic. I expect this Symposium to make a significant contribution to future academic and judicial discussions.

